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No. 83-1903

Office-Supreme Court, U.S.

FILED

AUG 9 1984

ALEXANDER L. STEVAS,  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1984

MORRIS MECHANICAL ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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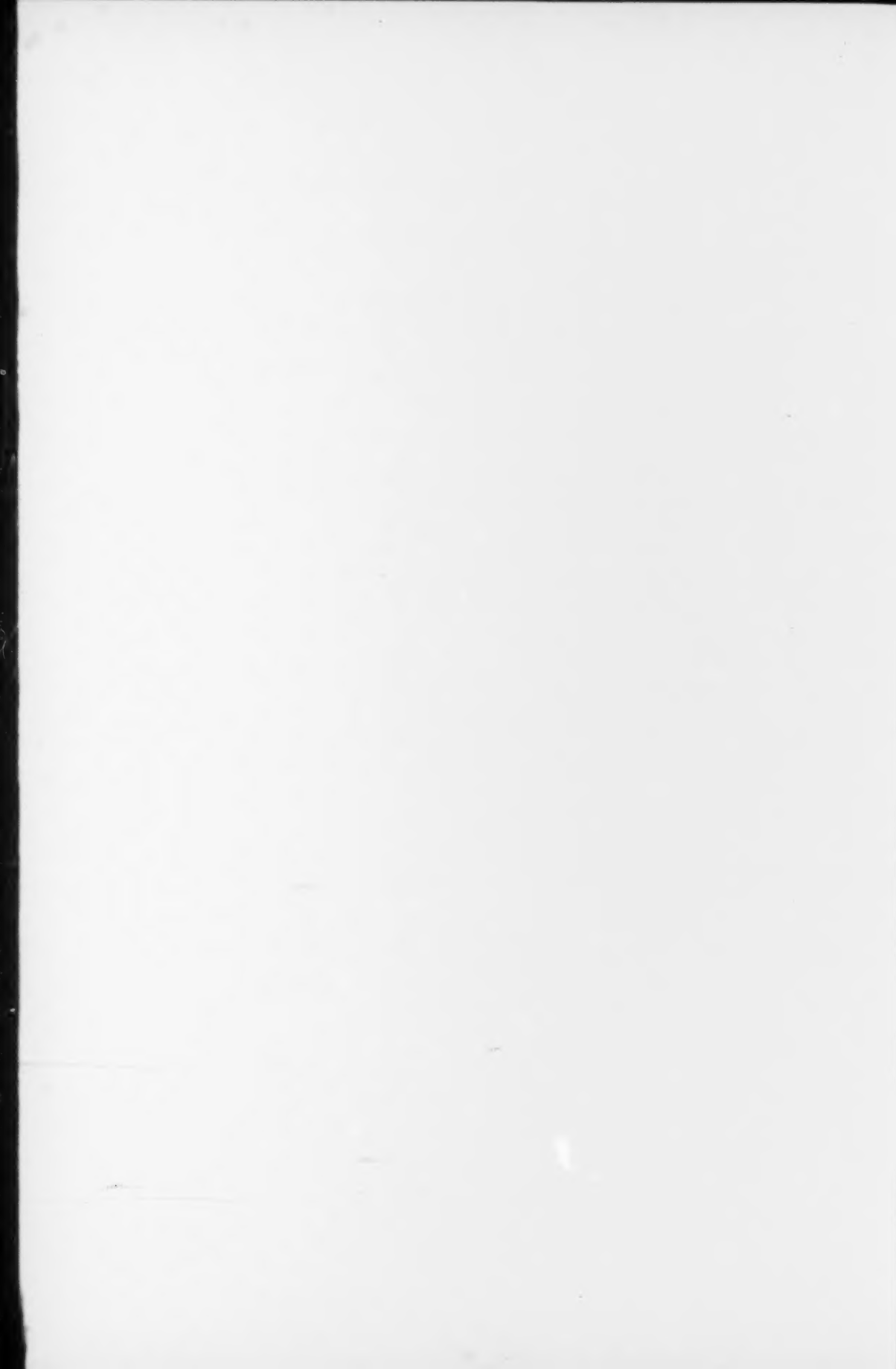
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## **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner seeks review of a decision of the court of appeals affirming the Claims Court's denial of its application under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for attorneys' fees and expenses incurred in a government contract suit.

1. Petitioner was awarded a contract by the General Services Administration to supply, and to perform start-up services for, a chiller for a construction project. Under the terms of the contract, which was awarded on March 29, 1978, the chiller was to be delivered by August 19, 1978. Petitioner did not deliver the chiller until April 8, 1979—231 days after the scheduled delivery date. Six months after delivery, petitioner completed the start-up services for the chiller. Pet. App. i-3, ii-11.

GSA withheld \$23,100 from petitioner's contract price as liquidated damages for failure to complete the work within the time specified in the contract. Petitioner then filed suit

in the United States Court of Claims to recover the amount withheld, and the court held in petitioner's favor (Pet. App. ii-1 to ii-39). The Claims Court<sup>1</sup> found that petitioner's "work" under the contract included completion of delivery and start-up services, and that the latter task could be performed only after installation of the chiller had been completed by another contractor (*id.* at ii-37 to ii-39). The court reasoned that petitioner's late performance was attributable to "supervening delays which were in no way attributable to [petitioner]" — the inability of another contractor to complete installation of the chiller. Accordingly, the court held that petitioner was not liable for failing to complete its work under the contract in a timely manner. *Id.* at ii-37 to ii-38.

Petitioner then applied for attorneys' fees under the EAJA, 28 U.S.C. 2412(d)(1)(A). The Claims Court denied the fee request, holding that the government's "conduct in litigating the issues in this case was substantially justified" (Pet. App. iii-14). Petitioner appealed, and the Federal Circuit affirmed the denial of petitioner's fee application (*id.* at i-1 to i-10). Reaffirming the rule established in *Broad Avenue Laundry & Tailoring v. United States*, 693 F.2d 1387 (Fed. Cir. 1982), the court of appeals first held that it is the government's position in the litigation, rather than the underlying agency action that precipitated the litigation, that must be "substantially justified" in order to preclude an award of attorneys' fees. The court then noted that the government's position at trial was that petitioner failed to give timely notice to GSA of the late delivery and that petitioner knew of the probability that delivery would be delayed even before the issuance of the invitation for bids

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<sup>1</sup>During the pendency of this suit, the Claims Court succeeded to the trial functions of the Court of Claims. Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, Tit. I, § 105(a), 96 Stat. 27.

(Pet. App. i-4). The court concluded that petitioner's successful refutation of these contentions at trial did not mean, in the circumstances of this case, that the government's position had not been substantially justified (*id.* at i-9). The court finally observed (*id.* at i-9 to i-10 (footnote omitted)):

Moreover, as the court below points out, it was not until trial and in post-trial briefing that facts developed concerning events and delays unrelated to [petitioner's] delivery and concerning its later "start-up" services on the chiller. Since prior to trial neither party had pursued these avenues, we cannot find that the Government's view that a genuine dispute existed was unreasonable \* \* \*.

2. Petitioner urges this Court to resolve the conflict in the circuits over the meaning of the phrase, "position of the United States," as used in Section 2412(d)(1)(A) of the EAJA. For the reasons stated in our Brief in Opposition in *Jarboe-Lackey Feedlots, Inc. v. United States*, No. 83-1916 (filed July 19, 1984), review of that issue is not warranted.<sup>2</sup>

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<sup>2</sup>We are furnishing a copy of our Brief in Opposition in No. 83-1916 to counsel for petitioner. The Court recently declined to review another decision raising the same issue. *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984). In addition to the cases cited in our Brief in Opposition in No. 83-1916 (at 9-10 & n.5), we note that the Eighth Circuit has recently rendered a decision on the issue, adopting the interpretation of "position of the United States" advocated by petitioner. *Iowa Express Distribution, Inc. v. NLRB*, No. 83-1589 (July 11, 1984). The court's discussion appears to be dictum, however, since the court also "observe[d] that the government's position has been consistent both at the prelitigation and litigation levels" (slip op. 7). As we note in the text, the same observation is applicable to nearly all EAJA cases, providing yet another reason why this Court's review is unnecessary.

a. Further review by this Court is unwarranted in this case because resolution of the conflict would not affect the result. Petitioner has not explained how—or whether—the rule it seeks would have changed the outcome here. There is good reason for this reticence. As is true in all but a handful of cases, the government's litigation position was simply a defense of the underlying action that precipitated the court proceeding; accordingly, petitioner's entitlement to attorneys' fees would not be affected by any distinction between the government's litigation position and the underlying agency action. See, e.g., *Houston Agricultural Credit Corp. v. United States*, No. 83-2370 (5th Cir. July 16, 1984), slip op. 4706; *Spencer v. NLRB*, 712 F.2d at 552. The government's justification for withholding a portion of the full contract price and the government's defense of that action at trial were identical, i.e., GSA was entitled to damages because petitioner was responsible for late delivery of the chiller to the construction site and therefore had failed to complete the work within the time specified by the contract.

Moreover, it does not follow that the action that precipitated the litigation was not substantially justified simply because facts came out during trial that had not previously been uncovered by either party. As the court of appeals held, "the test for determining whether the Government's litigating position is substantially justified is one of reasonableness, *depending upon all the pertinent facts in a given case*" (Pet. App. i-8 (emphasis added)). Here, "[b]oth parties tried the case on the assumption that the only issue involved was [petitioner's] responsibility for late delivery \* \* \* of the chiller to the site as if that were the event which completed the work to be performed under [petitioner's] contract" (*id.* at iii-12). Indeed, petitioner's "original request for a time extension [within which to meet the delivery deadline] was made on that basis" (*id.* at iii-13).



Thus, even if petitioner were correct in arguing that only the underlying action of the government is relevant in assessing fees (Pet. 11), the court of appeals was likewise correct when it stated that, on the facts of this case, "we cannot find that the Government's view that a genuine dispute existed was unreasonable" (Pet. App. i-10). The government cannot be faulted for failing to recognize that petitioner might have had a justifiable defense to its failure to complete the work in a timely fashion when petitioner also failed to recognize the defense.

b. Finally, as we explained in our Brief in Opposition in *Jarboe-Lackey Feedlots, Inc. v. United States*, *supra*, Congress is aware of the issue raised by petitioner and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of the EAJA will automatically expire on October 1, 1984, unless extended by Congress. 28 U.S.C. 2412 note. Bills are pending in the Senate and the House to extend the Act, and both include provisions that define "position of the United States." It is reasonable to assume that Congress will take action on the pending bills before the statutory expiration date. Thus, by the start of this Court's next Term, Congress either will have allowed the Act to expire or reauthorized it in a form that may well include a statutory definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of extremely limited importance. In these circumstances, we suggest that the Court should defer to Congress.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

AUGUST 1984